

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
March 21, 2007 Session

MIR ALI v. STATE OF TENNESSEE

Direct Appeal from the Criminal Court for Davidson County
No. 99-A-355 Cheryl Blackburn, Judge

No. M2006-01217-CCA-R3-PC - Filed July 24, 2007

The petitioner, Mir Ali, appeals from the post-conviction court's denial of post-conviction relief. On appeal, he contends that he received the ineffective assistance of counsel which caused him to enter an unknowing and involuntary guilty plea. Following our review of the record and the parties' briefs, we affirm the judgment of the post-conviction court denying post-conviction relief.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

J.C. McLIN, J., delivered the opinion of the court, in which JOSEPH M. TIPTON P.J. and THOMAS T. WOODALL, J., joined.

Theodora A. Pappas (on appeal and at trial), and Michael Mills (at trial), for the appellant, Mir Ali.

Robert E. Cooper, Jr., Attorney General and Reporter; Sophia S. Lee, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and James Milam, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Background

The record before us reveals that on February 19, 1999, the petitioner was indicted for the offense of custodial interference, a Class E felony.¹ The recitation of facts at the plea hearing

¹ In 1998, Tennessee Code Annotated section 39-13-306 stated in relevant part:

(a) It shall be the offense of custodial interference for a natural or adoptive parent, step-parent, grandparent, brother, sister, aunt, uncle, niece, or nephew of a child younger than eighteen (18) years of age or an individual adjudged to be incompetent to knowingly detain or move the child or individual adjudged to be incompetent from the vicinity where the child or person adjudged to be incompetent is found when the person knows that the detention or

(continued...)

indicates that the petitioner's former wife was awarded custody of their minor son, Ayman, pursuant to a final divorce decree. As part of the decree, the petitioner was given visitation rights for the months of June, July, and August conditioned upon the return of Ayman before school started in September. While exercising his visitation rights in 1998, the petitioner took Ayman, departed the United States of America, and went to India where he remained with his son for approximately six years. The petitioner's departure to India was in violation of the custody arrangement set forth in the divorce decree. The petitioner entered a plea of guilty to the indicted charge on December 16, 2004, and received a suspended sentence of one year followed by two years of supervised probation. The petitioner specifically noted that he understood the nature of the charge against him and the consequences of pleading guilty. The petitioner also stated that he was satisfied with the legal representation of his trial counsel.

A few months later, the state filed a petition to revoke the petitioner's conditional travel privileges reflected in the probation agreement. The state alleged that the petitioner misrepresented the date of his civil case in California in an effort to obtain court permission to go to California, abduct his son, and once again flee the country. A hearing was held; whereupon, the trial court found that the petitioner was not forthright in giving the exact dates of the civil hearing when requesting the court's permission to travel to California. Therefore, the court modified the conditions of the petitioner's probation "to prohibit the [petitioner] from all travel outside the State of Tennessee for a sufficient amount of time until the [petitioner] has established a record of compliance with his probationary sentence and has earned the Court's trust regarding out-of-state travel."

Thereafter, the petitioner filed a petition for post-conviction relief and an evidentiary hearing was held. At the hearing, the petitioner admitted he took his eight-year-old son, Ayman, to India in 1998 in violation of the terms of the divorce decree. However, once in India, the petitioner requested and was granted custody of his son by an Indian court. According to the petitioner, he attempted to return Ayman to the United States in 2003. The petitioner stated that his attempts to get Ayman back

¹(...continued)

moving of the child or person adjudged to be incompetent violates a temporary or permanent judgment or court order regarding the child's or incompetent's custody or care.

(b) It shall be a defense to custodial interference that the individual detained or moved in contravention of the order of custody or care was returned by the defendant voluntarily and before arrest or the issuance of a warrant for arrest.

....

(d) Custodial interference shall be a Class E felony unless the person taken from lawful custody is returned voluntarily by the defendant, in which case custodial interference is a Class A misdemeanor.

to the United States included taking Ayman to the U.S. Embassy in New Delhi and the U.S. Consulate in Bombay. However, Ayman's passport had expired in August of 2003 and the petitioner was informed that Ayman's passport could not be renewed without both parents' consent while Ayman was under the age of fourteen. The petitioner was told that once Ayman turned fourteen, he could get a passport with the consent of the petitioner.

The petitioner testified that after Ayman turned fourteen, he still encountered difficulties getting Ayman a passport. The petitioner cited his attempts to get Ayman back to the United States in 2004. He stated that he contacted the U.S. Consulate in Chennai, contacted a U.S. Senator and Congressman, and purchased plane tickets for Ayman to return to the United States. He also testified that he permitted officials from the U.S. Embassy to visit with Ayman at the petitioner's home in India, and as a result, U.S. officials knew where he and Ayman lived. The petitioner asserted that he knew an arrest warrant was awaiting him in Nashville because officials from the U.S. Embassy told him that Ayman was declared a missing child. The petitioner asserted that he sought to return Ayman to the United States in spite of knowing he would be arrested.

The petitioner testified that he went to the United States without Ayman because of the difficulty in renewing Ayman's passport. According to the petitioner, he left Ayman with his wife in India and he told her that officials from the U.S. Embassy could pick up Ayman whenever they were ready and return him to his biological mother in the United States. The petitioner stated that he had legal custody of his son in India, and therefore, his son could not be returned to the United States without his consent. The petitioner submitted various documents, namely emails, into evidence to support his testimony. Notably, some of these documents indicate that the petitioner desired to return to the United States in 2004 because he had experienced financial difficulties and health problems in India.

The petitioner testified that he corresponded with his trial counsel prior to his return to the United States. He stated that he informed counsel about his difficulties in securing a passport for Ayman. According to the petitioner, counsel failed to advise him that the voluntary return of Ayman was a statutory defense to the offense of custodial interference and based on the evidence, the offense could have been considered a misdemeanor instead of a felony. The petitioner maintained that he would not have pled guilty to the felony offense of custodial interference had he been informed of the possible defense of voluntary return of a child. The petitioner asserted that he only learned of this defense after pleading guilty to the felony offense. The petitioner asserted that he did surrender his son before he came to the United States.

On cross-examination, the petitioner acknowledged that the National Center for Missing and Exploited Children (NCMEC) had sent out a mailer in 2002 seeking information connected to the petitioner's abduction of Ayman. The petitioner also admitted that he returned to the United States without his son. According to the petitioner, his flight first took him to Toronto, Canada, where he was detained by authorities and given the option of returning to India or flying to Nashville. The petitioner chose to go to Nashville and was subsequently arrested. The petitioner acknowledged that his son did not arrive in the United States until almost a week after his arrest. The petitioner further

acknowledged that he made bond immediately after being arrested in Tennessee, but he did not offer any information concerning Ayman's whereabouts to officials in Tennessee because "nobody asked [him]." The petitioner admitted that he was attracted to the state's plea offer because it did not involve jail time. However, the petitioner lamented that his felony conviction limited his travel privileges and hindered his ability to get a job.

Syed Majid testified on behalf of the petitioner. Mr. Majid testified that he knew the petitioner because they had been neighbors in India and grew up together. Mr. Majid recalled that he saw the petitioner and Ayman in India in late 1999. Later, while Mr. Majid was living in the United States, he received a "missing child" postcard with the petitioner's and Ayman's picture on it. Mr. Majid called the phone number on the postcard. A few days later, Mr. Majid was contacted by Detective Sarah Bruner. Mr. Majid stated that he offered assistance to Detective Bruner because he knew the petitioner wanted to bring Ayman back to the United States. Mr. Majid stated that he told Detective Bruner of the petitioner's wishes. Mr. Majid noted that he spoke with Detective Bruner many times over the telephone.

Detective Sarah Bruner testified that she worked on this case for four years before the petitioner was arrested and Ayman was located and returned to his biological mother in California. Detective Bruner stated that in 2004, the petitioner contacted the State Department and expressed his desire to return to the United States because of health problems. The petitioner was told that he should return Ayman to the United States first. However, the petitioner vacillated on whether Ayman would return before him or accompany him to the United States. According to Detective Bruner, the petitioner did not disclose his plans to enter into the United States through Canada. Detective Bruner also noted that after the petitioner was arrested in Canada, he did not tell authorities where Ayman could be located and that the petitioner posted bond before Detective Bruner could question him about Ayman's whereabouts. After the petitioner was arrested, officials from the State Department went to the petitioner's last known address looking for Ayman. However, Ayman was not at the address. Detective Bruner recounted that Ayman was found in the slums of Hyderabad, India. On September 25, 2004, a week after the petitioner's arrest, the State Department made arrangements for Ayman to be brought back to the United States; whereupon, Ayman was reunited with his mother.

The petitioner's counsel testified that he had been practicing criminal law for a number of years. According to counsel, he was first contacted by an Indian attorney via e-mail. The Indian attorney informed counsel that the petitioner and his son wanted to return to the United States. The Indian attorney asked if counsel would contact Senator Lamar Alexander on the petitioner's behalf, which counsel did. Counsel asserted that from the email correspondence, he believed the petitioner's case involved custody and immigration issues. It was only after the defendant was arrested did he learn of the criminal nature of the petitioner's case.

Counsel testified that the petitioner officially retained him as counsel a few weeks after the petitioner was arrested in Canada. Counsel stated that he explained the charges to the petitioner. Counsel recounted that the state made several plea offers to the petitioner, and the petitioner

ultimately accepted an offer with no jail time. Counsel recalled that the petitioner was concerned about serving time in jail because he had health issues and seemed very happy with the state's plea offer. Counsel stated that the petitioner told him of the difficulty in getting Ayman a passport but did not elaborate. Counsel said he did not contemplate discussing the voluntary return defense with the petitioner because the petitioner did not really inform him of the details of Ayman's return to the United States. Counsel only knew that Ayman "magically appeared" a week after the petitioner was taken into custody. Counsel admitted that he was still clueless and hazy about the details of Ayman's return.

Following the evidentiary hearing, the post-conviction court entered an order denying post-conviction relief. In denying relief, the court made the following findings:

As to [counsel's] lack of knowledge about how Ayman returned to the US, the Court credits the testimony of [counsel]. Based on the testimony as well as the Court's review of the discovery and case file, the Court finds that [counsel] had no knowledge of how Ayman returned to the US, and given the information that had been provided to him there was no reason for [counsel] to believe that Ayman's return to the US was due to Petitioner's voluntary return of him. In fact, the court file includes a Declaration by Anjum Shariff [Ayman's biological mother] indicating that when Ayman was located to be sent back to the US, he "was recovered from a slum in Hyderabad, where [Petitioner] had left him."² Thus, the Court finds based on [counsel's] testimony and the court file, there was nothing to alert him that the return of Ayman to the US may have been voluntary. The Court notes that Petitioner does not refute that [counsel] was unaware of how Ayman returned.

Although the Court does not find that Petitioner's taking Ayman to the US Consulate in India in 2003 qualifies as voluntarily returning Ayman to US pursuant to TCA [39-13-306], even assuming *in arguendo* such action would justify raising the defense of voluntary return, the Court finds that Petitioner's testimony about these actions lack credibility. The Court has previously determined that Petitioner's testimony before this Court lacks credibility. . . .

Accordingly, the Court finds there is no merit to Petitioner's post-conviction claim.

II. Analysis

On appeal, the petitioner contends that he received the ineffective assistance of counsel which caused him to enter an unknowing and involuntary guilty plea. Specifically, he asserts that he would not have pleaded guilty to custodial interference had he been informed that the voluntary return of his son was a defense and that such defense could have resulted in a misdemeanor conviction rather than a felony conviction.

² Ms. Shariff's declaration was not included in the record on appeal.

In order for a petitioner to succeed on a post-conviction claim, the petitioner must prove the allegations set forth in his petition by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f). On appeal, this court is required to affirm the post-conviction court's findings unless the petitioner proves that the evidence preponderates against those findings. *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). Our review of the post-conviction court's factual findings, such as findings concerning the credibility of witnesses and the weight and value given their testimony, is de novo with a presumption that the findings are correct. *See id.* Our review of the post-conviction court's legal conclusions and application of law to facts is de novo without a presumption of correctness. *Fields v. State*, 40 S.W.3d 450, 457-58 (Tenn. 2001).

To establish the ineffective assistance of counsel, the petitioner bears the burden of proving that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense rendering the outcome unreliable or fundamentally unfair. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see also Arnold v. State*, 143 S.W.3d 784, 787 (Tenn. 2004). Deficient performance is shown if counsel's conduct fell below an objective standard of reasonableness under prevailing professional standards. *Strickland*, 466 U.S. at 688; *see also Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975) (establishing that representation should be within the range of competence demanded of attorneys in criminal cases). Prejudice is shown if, but for counsel's unprofessional errors, there is a reasonable probability that the outcome of the proceeding would have been different. *Strickland*, 466 U.S. at 694. A fair assessment of counsel's performance "requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689; *see also Nichols v. State*, 90 S.W.3d 576, 587 (Tenn. 2002). Both deficient performance and prejudice must be established to prove ineffective assistance of counsel. *Strickland*, 466 U.S. at 697; *see also Goad v. State*, 938 S.W.2d 363, 370 (Tenn. 1996). If either element of ineffective assistance of counsel has not been established, a court need not address the other element. *Strickland*, 466 U.S. at 697.

When a petitioner claims ineffective assistance of counsel in relation to a guilty plea, the petitioner must show a reasonable probability that, but for the errors of his counsel, he would not have pled guilty. *See Hill v. Lockhart*, 474 U.S. 52, 59 (1985); *Adkins v. State*, 911 S.W.2d 334, 349 (Tenn. Crim. App. 1994). When determining the knowing and voluntary nature of the guilty plea, the standard is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *North Carolina v. Alford*, 400 U.S. 25, 31 (1970); *see also State v. Pettus*, 986 S.W.2d 540, 542 (Tenn. 1999). When determining the knowing and voluntary nature of the guilty plea, the court must consider the totality of "various circumstantial factors," including:

the relative intelligence of the defendant; the degree of his familiarity with criminal proceedings; whether he was represented by competent counsel and had the opportunity to confer with counsel about the options available to him; the extent of advice from counsel and the court concerning the charges against him; and the

reasons for his decision to plead guilty, including a desire to avoid a greater penalty that might result from a jury trial.

Blankenship v. State, 858 S.W.2d 897, 904 (Tenn. 1993). A petitioner's solemn declaration in open court that his or her plea is knowing and voluntary creates a formidable barrier in any subsequent collateral proceeding because these declarations "carry a strong presumption of verity." *Blackledge v. Allison*, 431 U.S. 63, 74 (1977).

Upon review, we see nothing in the record to preponderate against the post-conviction court's findings that counsel was effective and that the petitioner's guilty plea was knowingly and voluntarily entered. The record before us suggests that the petitioner neither informed counsel of his intention to voluntarily surrender Ayman back to his mother's custody nor provided any factual details whereupon counsel could reasonably ascertain whether the petitioner had a viable statutory defense against the charge of custodial interference. In contrast, the record does indicate that the petitioner was fully informed of the charge of custodial interference set forth in the indictment. The record also reveals that the petitioner was fully advised of his rights, understood the nature and consequences of his plea, and was satisfied with counsel's performance in negotiating a favorable alternative sentence at the time of the plea. Accordingly, we fail to discern how counsel's representation fell below an objective standard of reasonableness.

Even assuming that counsel erred in failing to explain to the petitioner that the voluntary return of his son was a defense to custodial interference, we are unconvinced that but for counsel's errors, the petitioner "would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 59. Significantly, there is little proof to corroborate the petitioner's assertion that he voluntarily returned Ayman. Rather, the record supports the petitioner's plea of guilty to the felony of custodial interference. The record indicates that the petitioner abducted Ayman and went to India; whereupon a warrant was issued for the petitioner's arrest. After many years, the petitioner sought to return to the United States because he had incurred health problems and financial difficulties in India. Yet, the petitioner left India for the United States without Ayman and was subsequently arrested. Upon his arrest, the petitioner did not alert authorities as to Ayman's whereabouts. Indeed, Ayman was found and returned to the custody of his biological mother only after U.S. officials conducted a search of the slums of Hyderabad, India days after the petitioner's arrest in the United States. Charged with a Class E felony, the petitioner faced a possible sentence of two years imprisonment. The petitioner accepted a plea offer that kept him out of jail and admitted to the facts underlying the offense of custodial interference. In sum, the record does not preponderate against the court's finding that the petitioner entered a knowing and voluntary guilty plea. Accordingly, the petitioner is not entitled to relief.

III. Conclusion

Based on the foregoing reasoning and authorities, we affirm the judgment of the post-conviction court.

J.C. McLIN, JUDGE